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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DOMINIC CONSTANTINE MONTAGUE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

On Writ of Error to the United States District Court for the District of Idaho, Northern Division.

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STATEMENT OF THE CASE.

The defendant was indicted May 24, 1921, for dealing in, dispensing, selling and distributing morphine sulphate and cocaine hydrochloride. (Tr. pp. 7 and 8). He was convicted November 27, 1923, (Tr. p. 10), and sentenced to imprisonment in the United States Penitentiary at Leavenworth, Kansas, for eighteen months. (Tr. p. 11). A writ of error from this judgment was allowed which assigned error in overruling defendant's demurrer to

the indictment, certain rulings as to evidence, the action of the Court in denying defendant's motion for a directed verdict, and the action of the Court in denying motions in arrest of judgment and for a new trial.

The indictment is set out in full in the transcript and the charging part thereof in the brief of plaintiff in error.

The defendant was indicted under the name of Dominic Constantine. When the cause was called for trial, he announced that his true name was Dominic Constantine Montague and it was ordered that further proceedings be had under the latter name. (Tr. p. 10).

The testimony offered on behalf of the Government showed that on the early morning of April 6, 1921, witness H. T. Holtz, a special agent of the Great Northern Railway Company, was traveling with a freight train coming from Troy, Montana, to Spokane. While the train was on a sidetrack at Colburn, Idaho, witness Holtz walked up along the train and found a car door without a seal and opened it. (Tr. p. 16). This occurred between one and one-thirty A. M., April 6th. He saw a man and a boy. The man stated he was a brakeman and handed witness a bill fold which witness examined and returned to the man. (Tr. pp. 17 and 18). Over defendant's objection, the Court permitted

witness to testify that this bill fold contained a brakeman's card with the words, "Dominic Constantine, Kalispel Division, Great Northern Railway, brakeman." (Tr. p. 18). Witness told the man to get that pack sack and get out and when the man brought the pack sack and set it down in front of witness in the car door, he turned and jumped out of the car on the other side. Witness stated positively that at this time he recognized the man as Dominic Constantine, a Great Northern brakeman; that he had seen him at the hearing in the Federal Court at Spokane and that he was the defendant in this action. (Tr. p. 19). Witness fired as defendant jumped from the car but defendant escaped in the brush. Witness identified the pack sack which he marked at the time and it was introduced in evidence. The pack sack contained a grip which was also identified and introduced in evidence and the grip contained a large quantity of morphine and cocaine. Witness took the pack sack, the grip and its contents up on the engine where it was opened and examined. He kept the bag and its contents in his custody until he reached Spokane and delivered them to Mr. Fred Watt of the United States Department of Justice. Witness initialed the bottles marked plaintiff's Exhibits Nos. "3" and "4". (Tr. p. 22). Witness positively identified both the pack sack and the grip which were introduced in evidence over objection of counsel for the defense. (Tr. pp. 20-22).

The witness Ed. Thompson and M. L. Stickney testified that they turned the freight train over to Special Agents Holtz and Weigner at Troy, Montana, on the evening of April 5th, 1921, and that at about five-thirty P. M. that evening they saw a man, answering the description of defendant, walking up the track towards town from the train carrying a black grip and witness Stickney saw him jump out of a car on the freight train .(Tr. pp. 26 and 27). Witness De Long testified that on the morning of April 6, 1921, about seven-fifteen or seven-thirty, he saw the defendant going south on Harrison Street in Hillyard, Washington, six or seven blocks from the yard office. Witness went off shift at seven o'clock. In the morning before he went home, he had been told that the special agents had found this defendant with some dope. Witness had known defendant and worked with him at Whitefish, Montana. (Tr. pp. 28 and 29).

Witness Pratt, also a special agent of the Railway Company, identified the grip, plaintiff's Exhibit "2", as a grip which he had seen in the possession of this defendant about a month previous to April 6th. (Tr. pp. 29 and 30).

Fred W. Watt, a special agent of the Department of Justice, who was stationed at Spokane in 1921, testified that Mr. Holtz delivered to him a grip containing narcotics on April 6, 1921. Plaintiff's Exhibit No. "2", witness said, looked like the grip with

a new handle on it. There were forty bottles in the grip, thirty-two of which were marked "morphine" and eight marked "cocaine". They bore printed labels. The grip and its contents were placed in the iron cage in the special agent's office. Mr. Harold W. Cole and Mr. Lou Watts, Federal narcotic agents, came into the office that day, counted the bottles and later Mr. Cole came back and got four bottles. (Tr. pp. 30-32).

Mr. Harold W. Cole, a Federal narcotic agent with five years' experience and who qualified as a graduate pharmacist and a person capable of testing cocaine and morphine, testified that he initialed several of the bottles on April 6, 1921, when he counted them; that later he secured two or four of the bottles, brought them to Coeur d'Alene to appear before the grand jury and tested them and found that they were morphine sulphate and cocaine hydrochloride and that there were approximately thirty-two ounces of the latter and eight ounces of the morphine sulphate. None of the bottles bore revenue stamps. Exhibits "3" and "4" were identified as the bottles witness tested, and were introduced in evidence. (Tr. pp. 32 and 33). Witness further testified that in legitimate sales, the value was about $12.00 an ounce for the morphine and $10.00 an ounce for the cocaine; that the current price in illegitimate sales at that time in the Northern Idaho locality was $60.00 an ounce for morphine

and $50.00 an ounce for cocaine. This is the amount the retailer would pay the wholesaler or smuggler. On sales by the retailer to the customer, an enormous profit is made.

Witnesses Gatons, L. R. Watts, Harry V. Williamson and Harry W. Ballaine, Federal narcotic agents, testified as to the custody of the forty bottles of cocaine and morphine between the date of their original seizure and their production in Court. (Tr. pp. 35-39), and the other thirty-eight bottles were introduced in evidence. (Tr. p. 38).

At the close of the Government's case, defendant renewed his motion for a directed verdict "for the reason that there had been no proof of any sale". (Tr. p. 39). The Court denied the motion and thereupon defendant produced as a witness in his behalf Mrs. T. B. Campbell, a resident of Spokane, Washington, who testified that the defendant rented a room from her about March 1, 1921, and that he was at her house on April 5th, 6th, 7th and 8th, 1921, and slept there every one of those nights and every night during March, April and the first two weeks of May. She testified that defendant and another man rented the rooms and that defendant had to come through the room where she slept in order to get to his bed room; that he would not turn on the light when he came through and he usually came in in the night time. She also testified that on the 6th day of

April, 1921, defendant took her to Hillyard, Washington, during the day, to look at a couple of lots but that they never got out of the car and could not find the lots.

The motion for a directed verdict was not renewed at the close of the evidence and no exceptions were taken to the instructions of the Court.

No reference whatever to any motion in arrest of judgment or for a new trial appears either in the bill of exceptions or at any point in the record other than in the assignment of error.

BRIEF OF THE ARGUMENT.

It was not necessary to allege in the indictment that the defendant was a person required to register before selling, dealing in, dispensing, etc., narcotic drugs. This was clearly implied from the allegation that he sold, dealt in, dispensed, and distributed without having registered.

Section 1, Act of December 17, 1914, as amended, 6287G, U. S. Compiled Statutes, Supp. 19;

Section 8, Act of December 17, 1914, 38 Stat. 789;

Pierriero vs. United States, 271 Fed. 912;

Bacigalupi vs. United States, 279 Fed. 111.

Secondary evidence of a writing satisfactorily shown to be in possession of defendant may be admitted. No notice to produce need be given.

McKnight vs. United States, 115 Fed. 972;

McKnight vs. United States, 122 Fed. 929;

Federal Case No. 14,977;

United States vs. Reyburn, 6 Pet. 366, 368.

The Fourth Amendment to the Constitution, pertaining to unlawful searches and seizures, relates to government action only. It does not prohibit the use in evidence by the United States of matters or things obtained or secured by private parties without search warrants.

Herrine vs. United States, 276 Fed. 806;

Burdeau vs. United States, 256 U. S. 465.

A motion for a directed verdict is not reviewable unless made or renewed at the close of the evidence.

Clark vs. United States, 245 Fed. 112;

Thlinket Packing Co. vs. United States, 236 Fed 109;

Zoline Federal Criminal Law and Procedure, Sec. 422.

A motion in arrest of judgment, if made, but not shown in the Bill of Exceptions, nor in the record prepared in accordance with the amended praecipe therefor, is not before the Appellate Court and cannot be reviewed. Such a motion is not reviewable.

Andrews vs. United States, 224 Fed. 418;

Beyer vs. United States, 251 Fed. 39.

Similarly a motion for a new trial not shown in the record, nor included in the Bill of Exceptions is not before the Appellate Court. Such a motion is not reviewable.

Lueders vs. United States, 210 Fed. 419, 127 C. C. A. 151;

Ryan, et al., vs. United States, 283 Fed. 975.

Proof of the possession of large quantities of narcotic drugs in unstamped packages is sufficient, if unexplained, to sustain a verdict that the defendant was a dealer or distributor.

Pierriero vs. United States, 271 Fed. 912;

Bran vs. United States, 282 Fed. 271.

ARGUMENT.

ASSIGNMENT OF ERROR NO. 1.

Sufficiency of Indictment; Failure to Negative Exemptions.

The first assignment of error is to the effect that "the Court erred in overruling defendant's demurrer interposed to said indictment in said cause."

Plaintiff in error defends this assignment on the single ground that the indictment is defective in that it "does not allege that the defendant is not of the class exempted by the statute."

The indictment in this case was brought under that provision of the Act of December 17, 1914, as

amended, and now contained in Compiled Statutes, Annoted, Supp. 19, 6287G, reading as follows:

> "It shall be unlawful for any person required to register under the provisions of this act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section."

Section 8 of the Act of December 17, 1914, 38 Stat. 789, reads as follows:

> "That it shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of section one of this Act: Provided, That this section shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this Act, having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician, dentist or veterinary surgeon registered under this Act; or to to any United States, State, County, Municipal, District, Territorial, or insular officer or official who has possession of any said drugs, by reason of his offcial duties, or to a warehouseman holding possession for a person registered and who has paid the taxes under this Act; or to common carriers engaged in transporting such drugs: Provided,

> further, That it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this Act; and the burden of proof of any such exemption shall be upon the defendant."

It will be noted that Section 8 of the Act just above quoted makes possession or control of narcotic drugs presumptive evidence of a violation of section one of the Act, the section under which the indictment in this case was brought. It will be further noted that by the concluding provisions of said Section 8, it is specifically made unnecessary to "negative any of the foregoing exemptions in any complaint, information, indictment or other writ or proceeding laid or brought under this Act."

It further definitely places upon the defendant the burden of proving that he comes within any ex-exemption should he desire to claim that to be the case.

The defendant in error cites but a single case in support of his position, namely, the case of United States vs. Woods, 224 Fed., page 278. Without discussing the merits of that particular decision, which was a ruling on demurrer by a District Court, it is respectfully submitted that the decision does not correctly state the law.

The case of Pierriero vs. United States, decided in the Circuit Court of Appeals for the Fourth Cir-

cuit and reported in 271 Fed. 912, is exactly in point on this question. In that case, the Court used the following language:

> "It is also contended that to convict under the amended section it must be alleged and proved 'that the accused is one of those persons required to register and pay the special tax', even if untaxed and unstamped drugs be found in his possession. We are not of that opinion. The clause above quoted includes, not only those who purchase, but also those who sell and dispense, and the latter are specifically required to register and pay the special tax. Therefore an indictment in the language of the statute, charging that defendant 'did sell, dispense and distribute', as in this case, alleges by necessary implication that he is within the class required to register. And if there be proof that unstamped drugs were found in his possession the cause in question creates the presumption that he has violated the amended section. The burden is then upon him to show that he is not in the class required to register, and that his possession was not unlawful, as was held to be the case in United States vs. Wilson, (D. D.) 225 Fed. 82."

It will be noted that that case seems to go much farther than the case at bar. In that case, the indictment seems to have alleged merely that the defendant "did sell, dispense and distribute" and the Court held that this was sufficient to raise the "necessary implication that he is within the class required to register." In the case at bar, the indictment not only alleged that the defendant did "deal in, dispense, sell and distribute" certain narcotic

drugs, but that he did this "without first having registered with the Collector of Internal Revenue for the District of Idaho his name and place of business and place or places where such business was to be carried on, as required by law." Clearly, this is sufficient to raise the necessary implication that the defendant in this case was within the class required to register.

The ruling of the Court in the Pierrero case was cited with approval by this Court in Bacigalupi vs. United States, 274 Fed. 367. See also James vs. United States, 279 Fed. 111.

ASSIGNMENT OF ERROR, NO. 2.

Motion for Discharge on Opening Statement.

At the close of the opening statement, attorney for defendant moved that defendant be discharged because under the statement of the prosecutor there was no testimony to the effect that defendant had actually dealt in, dispensed, sold or distributed narcotics. The denial of this motion is assigned as error, but no authority is cited in support of this position. Doubtless none could be found. It is difficult to understand, however, why a defendant who has been indicted by a grand jury should be dismissed without trial merely because the prosecutor, in his opening statement, should fail to state fully the evidence to be offered by the Government. Furthermore, under Section 8 of the statute and the decisions hereinafter cited, possession of such a

large amount of narcotics is presumptive evidence of a violation of the provisions of Section 1 of the Act under which defendant was indicted, and the opening statement clearly showed such possession.

ASSIGNMENT OF ERROR NO. 3.

Secondary Evidence of Contents of Document.

Under this assignment, objection is made to the admission of the testimony of Mr. Holtz as to the contents of a certain bill fold. (Tr. pp. 17 and 18). The evidence showed that defendant handed witness the bill fold, witness saw it, examined it and handed it back to the defendant. Under such circumstances, secondary evidence as to the contents of the bill fold was clearly competent.

In McKnight vs. United States, 115 Fed. 972, at page 980, the Circuit Court of Appeals for the Sixth Circuit held as follows:

> "The authorities seem very clear that in such cases, where a criminating document directly bearing upon the issue to be proven is in the possession of the accused, the prosecution may be permitted to show the contents thereof, without notice to the defendant to produce it. As it would be beyond the power of the Court to require the accused to criminate himself by the production of the paper as evidence against himself, secondary evidence is admissible to show its contents. As the introduction of secondary evidence of a writing in such instances is founded upon proof showing the original to be in the possession of the defendant, it will ordinarily be in his power to produce it, if he

> regards it for his interest to do so. The Court, as we have seen, cannot compel a defendant in a criminal case to produce an incriminating writing. The notice would therefore be futile as a means of compelling the production of the document, and refusal to comply therewith might work injustice to the defendant in the inferences drawn from its nonproduction."

The same court later reiterated this rule in the following language:

> "Inasmuch as a defendant could not be compelled to produce any such criminating document, we held that neither notice nor demand to produce same was necessary, but that seconary evidence might be made in respect of any document which the evidence should show in the possession or under the control of the defendant."
>
> McKnight vs. United States, 122 Fed I, at p. 929.

In Federal case, No. 14977, Mr. Justice Baldwin of the Supreme Court, sitting at the circuit, said:

> "In such cases the admission of the secondary evidence depends on tracing the original to the hands of the defendant or third person, from whom it cannot be procured and not on the question of notice. This is the rule laid down in Rex vs. Layer, 6 How. St. Tr. 319, and adopted in Le Merchant's Case, 2 Term. R. 203, note in Snell's case, 3 Mass. 82, and in U. S. vs. Reyburn, 6 Pet. 366, 368, 8 L. ed. 424. The evidence goes to the jury, who will decide whether the paper has been so traced. It is a legal foundation for a verdict against the defendant, as if the original had been produced,

and it is not restricted to papers which are the immediate subject of the indictment. Rex vs. Gordon, Leach, 300, note."

These cases lay down the true rule which was followed by the trial court.

ASSIGNMENT OF ERROR NO. 4.

Was taking grip containing narcotics an unlawful search or seizure?

The fourth assignment of error is in regard to the testimony of the witness Holtz as to the contens of a certain pack sack and grip which were seized by him without a warrant (Tr. pp. 20 to 22). The witness Holtz was not a Federal employee, but was in the employ of the railroad company. Under the generally accepted rule in such cases, where the evidence is obtained by a state officer, police officer or some person specially employed, as in this case, and the evidence is afterwards turned over to the Federal authorities, the objection that the evidence was obtained without a search warrant will not be sustained. See Herine vs. United States, 276 Fed. 806, a late case decided by this Court. In that case wines and liquors were seized by city police officers upon notification of a disturbance of the peace and this Court held that the seizure of such liquors as evidence was not an invasion of the security given by the Fourth Amendment to the Constitution and that the Government had a right to use the evidence upon the trial of defendant for violating the Federal law.

This question was conclusively determined by the Supreme Court of the United States in the case of Budeau vs. McDowell, 256 U. S. 465, where the Court, at page 475, said:

> "The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.
>
> "In the present case the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company. It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another. A portion of the property so taken and held was turned over to the prosecuting officers of the Federal Government."

These cases show that there is no merit in this assignment of error.

ASSIGNMENT OF ERROR NO. 5.

Motion for Directed Verdict.

The motion for a directed verdict was made at the close of the Government's case and thereafter defendant called a witness and offered testimony to prove an alibi. At the close of the case, defendant did not renew his motion and it is clearly held that in such cases the motion was waived.

In Clark vs. United States, 245 Fed. 112, this Court made the following statement at page 114:

> "Error is assigned to the denial of the motion of plaintiff in error to dismiss at the conclusion of the plaintiff's testimony. To this it is sufficient to say that the motion was waived by the introduction of evidence on behalf of the plaintiff in error, and his failure to move for an instructed verdict at the close of the evidence."

In Thlinket Packing Company vs. United States, 236 Fed. 109, which was also a criminal case, this Court, at page 112, made the following statement:

> "As to the questions of fact which were presented as grounds for the motion, it is sufficient to say that they were waived by the act of the plaintiff in error in thereafter proceeding to offer its testimony in defense, and by failing to renew the motion at the close of the trial. Gould vs. United States, 209 Fed. 730, 126 C. C. A. 454; Sandals vs. United States, 213 Fed. 569, 130, C. C. A. 149; Stearns vs. United States, 152 Fed. 900, 82, C. C. A. 48."

See also 1 Zoline Federal Criminal Law and Procedure, Section 422. The author there states that

the rule is not applicable where there is no legal or competent evidence whatever in the record justifying the conviction, and also suggests that the amendment to Section 269 of the Judicial Code by the Act of February 26, 1919, to the effect that,

> "On the hearing of any appeal, certiorari, writ of error or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

did not change the rule with regard to the necessity of renewing the motion for a directed verdict at the close of the evidence.

ASSIGNMENT OF ERROR, NO. 6.

Motion in Arrest of Judgment.

Neither the Bill of Exceptions, settled and allowed by the Court, nor the record prepared in accordance with the amended praecipe for transcript shows any motion in arrest of judgment. Such a motion, if actually made, cannot, therefore, be considered because it is not before the Court. Furthermore, it is settled law in this Circuit that a motion in arrest of judgment is not reviewable. See Andrews vs. United States, 224 Fed. 418, and Beyer vs. United States 251 Fed. 39.

ASSIGNMENT OF ERROR, NO. 7.

Motion for New Trial.

For the reason given in discussing assignment

No. 6, supra, the motion for a new trial cannot be considered. Such motion, if made, is not before this Court. Moreover, the law is well settled that the granting or refusing of a new trial rests in the sound discretion of the trial court and is not reviewable on writ of error. Lueders vs. United States, 210 Fed. 419, 127 C. C. A. 151; Ryan, et al., vs. United States, 283 Fed. 975.

ASSIGNMENT OF ERROR, NO. 8.

In the brief of Plaintiff in Error, there is inserted an assignment of error, under the above number, reading:

"that the Court erred in passing judgment."

This is an assignment set out in the brief but not included in the assignment of error filed as required by Section 997 R. S. This assignment cannot, therefore, be considered, unless the Court should hold that it is a "plain error not assigned," (Rule 24-4, this Court) which does not appear to be the case.

ASSIGNMENT OF ERROR, NO. 9.

Insufficiency of the Evidence to Support Verdict.

The brief of plaintiff in error likewise contains an assignment under this number not included in the assignment of errors filed in the court below, nor included in the transcript. It is, therefore, not before the court except as it may be included in Assignment No. 5 which has been hereotfore discussed or

except as it may be regarded as a plain error not assigned. In any event, there can be no serious question of the sufficiency of the evidence to support the verdict. The evidence will be found outlined in the statement at the beginning of this brief. The one important, outstanding fact is that the defendant was in possession of a large amount of cocaine and morphine, which, as sold to the retailer, would according to the testimony of witness Cole, (Tr. p. 35), have been worth about $16,000.00. The Court very properly instructed the jury that possession of the drugs, while under some circumstances it might be lawful, was a circumstance to be considered, and that the quantity and value had a bearing upon the question as to whether or not the possession was had in the course of dealing in, dispensing, distributing and selling such drugs. The evidence also showed from the bottles themselves that the necessary revenue samps were not attached (Tr. p. 32) and the Court instructed the jury as to the effect to be given to this fact. These instructions are clearly in accordance with the provisions of Sections 1 and 8 of the Harrison Act, as amended, and as provided in these sections, the absence of appropriate tax paid stamps is prima facie evidence of a violation of Section 1 and possession of the prohibited drugs is presumptive evidence of a violation not only of Section 8 of the Act, which prohibits mere possession, but also is presumptive evidence of a violation of Section 1 under which this defendant

was charged. No exception was taken to the charge and attention is called to it for the purpose only of showing the light in which the evidence as to the possession of such a large quantity of these drugs went before the jury.

In the case of Pierriero vs. United States, 271 Fed. 912, the Circuit Court of Appeals for the 4th Circuit considered a similar case. A handbag was found in defendant's room containing unstamped cocaine and gum opium of the estimated value of $60,000.00 or more, according to prices paid by addicts. The Court left it to the jury to determine whether or not the bag was actually in the possession of the defendant. The Court held, as we have before pointed out, that the indictment sufficiently charged defendant with selling, dispensing and distributing and the trial court's instruction to the effect that the possession of this large amount of drugs not in the original stamped package was prima facie evidence of purchase, sale and dispensing was upheld by the Appellate Court.

In Bram vs. United States, 282 Fed. 271, (C. C. A. 8th Circuit) the defendant was charged as a dealer or distributer. His entire defense was that the grips containing thirty-five ounces of morphine and seventy-five ounces of cocaine did not belong to him and the Court said:

> "The unexplained possession of such an amount of these drugs under the circumstances

shown by the evidence was ample to sustain a verdict that accused was a dealer or distributor within the section."

For all of the reasons hereinbefore given it is clear that the verdict and judgment should be sustained.

Respectfully submitted,

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